



LEGAL BRIEFING

To Recover Fees Under Indemnity Provision, Be Specific

By Jan A. Gruen and Anne Kelley

A strong indemnity provision in a construction subcontract enables a builder to obtain defense and indemnity in an action by a third party, but does it also allow for the recovery of attorney fees in a direct action against the subcontractor? The California courts have held that even a Type I indemnity provision does not allow for the recovery of such fees in a direct action unless the indemnity clause specifically addresses this situation.

A typical indemnity provision requires the subcontractor to pay the builder's attorneys' fees and costs for any and all damages, losses, costs, expenses and claims arising out of the subcontractor's work. It might seem logical that if, pursuant to such a provision, a subcontractor must pay the builder's attorneys' fees in the event of a third-party claim, that the subcontractor must pay the builder's attorneys' fees in a direct action against the subcontractor. This issue can arise, for example, where a builder repairs defective construction (rather than waiting to get sued) and then pursues a claim against the culpable subcontractors.

However California cases reject this broader interpretation and hold that a subcontractor is only obligated to pay the attorneys' fees and costs incurred by the builder in connection with third-party claims against the builder. California law further provides that if an indemnity provision is to apply to both third-party claims and direct claims brought by the builder against its subcontractor ("intra-party" disputes), the provision must clearly and expressly indicate the broader intent of the parties to include intra-party disputes.

In addition to such intra-party language in indemnity provisions, the builder can recover fees in a direct action if it includes a separate provision for attorneys' fees and costs in the subcontract.

Bear in mind that whether attorneys' fee language appears in an indemnity provision or in a separate attorneys' fees and cost provision, a builder may ultimately have to pay the subcontractor's attorneys' fees and costs if the builder is not the "prevailing" party to the lawsuit.

The Unstable Future of Indemnity

Even a carefully written indemnity provision may, in the future, fail to provide adequate protection.

Assembly Bill No. 758, which passed the State Assembly and Senate and as of this writing sits on the Governor's desk, seeks to drastically amend California statutes pertaining to the scope of indemnity provisions in contracts for residential construction. The bill states that indemnity agreements in residential construction contracts entered into after January 1, 2006, are void and unenforceable to the extent claims relate to the negligence of the builder, the builder's other contractors, or for defects in design furnished by those persons. Read literally, since virtually every construction defect claim or lawsuit contains a claim of builder negligence, there is concern that if this bill becomes law in California, a court will find any indemnity agreement between a builder and a subcontractor to be unenforceable.

Thus the future of indemnity protection is uncertain. At present a carefully written indemnity provision that provides for the recovery of actual attorneys' fees and costs incurred in connection with third-party and intra-party disputes, is still the best method of ensuring builder protection for defective conditions or injuries caused by subcontractors.

Jan Gruen is managing partner of the firm's Walnut Creek office and specializes in insurance, construction risk and real estate litigation. She can be reached at jan.gruen@ndlf.com. Anne Kelley is a litigation associate in that office and can be reached at anne.kelley@ndlf.com.



Kelo Decision Creates Drama for Property Owners; Effects in California Largely Superseded by Existing Laws

By Charles S. Krolikowski

In a landmark decision that raised concerns of property owners throughout the country, the United States Supreme Court ruled in *Kelo v. City of New London* that a city can "take" private residences for the sole purpose of promoting private development, not for public use. However, the impact of the case on California property owners is limited due to our state's existing eminent domain and redevelopment laws.

The Fifth Amendment to the United States Constitution provides the basis for the government's ability to acquire property,

and states in part: "Nor shall private property be taken for public use, without just compensation." While the term "public use" has evolved over the years to include the elimination of "blight," it has not meant that the government can take property from one private person and give it to another private person; until now.

In *Kelo*, a divided Court effectively eliminated the Fifth Amendment's "public use" requirement when it upheld a decision of the Connecticut Supreme Court to allow the City of New London to take private residences for purposes of private development. The property had not been deemed blighted.

The Court restricted its decision to the facts in *Kelo* and stressed that individual states can be more restrictive than the State of Connecticut with respect to the scope of eminent domain acquisitions. In fact, local and state politicians across the country are proposing legislation to restrict eminent domain acquisitions by public entities. In California, the legislature is considering a two-year moratorium on the condemnation of owner-occupied residential properties to allow for a study of the issue.

(see *Kelo*, page 2, col. 2)

The firm is proud to announce that co-founding partner **Greg Dillion** was honored as one of four Orange County “Fathers of the Year” by the Father’s Day Council (FDC) and the American Diabetes Association (ADA).

In addition to his successful career as a top attorney, Greg and his wife, Cindy, a real estate vice president with Pacific Life, have five highly accomplished children: two at USC and three who will attend Corona del Mar middle and high schools next year.

The firm also wants to thank clients and friends for their tremendous support of Greg’s award. Greg is grateful to “all those who took time out of their busy schedules to attend the awards event, who contributed to the ADA and who sent such kind and supportive congratulatory notes. The award is and will remain a highlight of my life.”

To best serve our growing list of clients with operations in the Central Valley and Northern California, this summer we opened an office in Walnut Creek. We are delighted that **Jan Gruen**, formerly a principal in the Real Estate Group at Morgan Miller Blair and a highly respected Bay Area lawyer, comes to the firm as managing partner of our new facility. The firm has also added litigation associates **Anne Kelley** and **J. Brian Morrow** in that office.

The firm welcomes as partner **Gary F. Torrell**, formerly executive vice president and general counsel for Downey Savings and Downey Financial Corp. of Newport Beach. Officed in Santa Monica, he specializes in complex business litigation and corporate transactions. Also coming on board in Santa Monica as of counsel is **Scott Edward Walker**, an M&A and securities-law specialist.

We are pleased to announce the hiring of seven new associates in Newport Beach: litigation attorneys **Sarah E. Greenberg**, **Stephen M. Hauptman**, **James Hultz**, **Ryan Manning**, **Duyen T. Nguyen** and **Fred L. Wilks**, and **Tabitha Rainey**, a transactional real estate specialist.

Six firm attorneys were recognized in recently published peer-review surveys. **Jan Gruen** has been named a “2005 Northern California Super Lawyer,” and **Steve Ruben**, head of the Trusts and Estates practice, was named for the ninth consecutive year to the “Best Lawyers in America.” Recognized as “Rising Stars” were partners **Joe Ferrentino** and **Joan Huckabone Mayer**, and **Chuck Krolikowski**, of counsel, all located in Newport Beach, and **Jeff Dennis**, an associate in our Santa Monica office.

The jury verdict in excess of \$20 million against the City of Anaheim and in favor of 22 homeowners and developer 396 Investment Company (formerly known as The Fieldstone Company) is now final as the California Supreme Court recently declined to review a last appeal by the City of Anaheim. **Greg Dillion** and **Joe Ferrentino** were lead counsel for the prevailing parties.



(Kelo continued from page 1)

What does *Kelo* mean in California? Unlike Connecticut, California does not have a statute that allows the taking of private property for the sole purpose of generating future economic benefits. Rather, under Article I, Section 19 of the California Constitution and applicable provisions of the Health and Safety Code, public entities in California can take private property for public uses such as freeways, schools, parks, dams, etc., and to redevelop blighted areas.

The decision in *Kelo* has struck a chord with millions of people across the nation. It will only be a matter of time before individual states adopt legislation to restrict the taking of private property for the sole purpose of generating additional economic benefits. It remains to be seen if the uproar surrounding the decision prompts substantial change to California’s eminent domain and redevelopment laws.

Chuck Krolikowski is of counsel in the firm’s Newport Beach office, where he focuses on eminent domain, inverse condemnation and related matters. He can be reached at charles.krolikowski@ndlf.com.

About Newmeyer & Dillion LLP

Newmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

Litigation

- *Business*
 - Unfair Competition/Trade Secret
 - Business & Professions Code §17200
 - Partnership Dissolution
 - Lender Liability
 - General Business Disputes
- *Real Estate*
 - Construction
 - Real Estate Finance
 - Environmental Warranty
 - Title
 - Inverse Condemnation and Eminent Domain
 - Government Tort Claims
 - Regulatory Takings
- *Labor & Employment*
 - Wrongful Termination
 - Employment Discrimination
 - Sexual Harassment
- *Insurance & Risk Management*
 - First and Third Party Coverage
 - First and Third Party Bad Faith
- *Products Liability*
- *Appellate Practice*

Trusts & Estates Administration & Litigation

Estate & Tax Planning

- Wealth Transfer Planning
- Business Transition Planning
- Wills, Trusts, Probate

Business Arrangements

- Formation, Structuring, Maintenance and Evaluation of Business Entities (Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Ventures)
- Shareholder, Partnership and Stock Option Plan Agreements
- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
- Licensing and Franchising Arrangements

Corporate Finance, Securities and Mergers & Acquisitions

- Venture Capital Financing
- Mergers, Acquisitions, and Leveraged Buyouts
- Public and Private Securities Offerings
- Federal Securities Law

Real Estate Transactions

- Acquisition, Development, Option, Sale and Lease of Real Property (Residential, Retail, Multifamily, Office, Industrial, Agricultural)
- 1031 Like-Kind Exchanges
- Master Planned Community Developments and Community Associations
- Department of Real Estate and Other Regulatory Filings
- Construction Related Matters
- Military Base Reuse
- Due Diligence

Real Estate Lending & Finance

- Documentation of Real Estate, Personal Property and Unsecured Loans
- Coordination of Loan Transactions for Borrowers

Land Use/Environmental

- Development Agreements
- Mitigation Agreements
- Subdivision Map Act
- Environmental Permitting